LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
JUL 9 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Utah.

PETITION FOR REHEARING.

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
WILLIAM E. MARX,
Post Office Box 351,
Los Angeles, Calif. 90053,
Attorneys for Southern California Edison Company.

R. CLYDE HARGROVE,
1123 Commercial National Bank Building,
Shreveport, Louisiana 71101,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Utah.

PETITION FOR REHEARING.

Southern California Edison Company (Edison), an Intervenor in the case below and an Appellee herein[1], prays that this Court grant rehearing of its decision of June 16, 1969, vacating the judgment of the United States District Court for the District of Utah and remanding the cause for further proceedings.

The Nature of Edison's Operations and Its Quest for Competition.

1. Edison is a public utility corporation which generates electricity and serves more than seven million people in southern California. Edison's steam electric generating plants require enormous volumes of fuel to

[1]Edison was an appellant in *Cascade Natural Gas Corporation, et al. v. El Paso Natural Gas Company*, 386 U.S. 129 (1967).

provide adequate service to its customers, and, operating under as strict air pollution control regulations as may be found anywhere in the country, its principal reliance for such fuel supplies is on gas. The existence of an adequate and reasonably assured supply of gas at a reasonable price thus is essential to Edison's ability to maintain reliable and economic electric service to the southern California public.

Edison is the largest ultimate consumer of gas in southern California. However, the gas service is rendered to Edison by its principal suppliers (Southern California Gas Company and Southern Counties Gas Company, subsidiaries of Pacific Lighting Corporation) on an interruptible basis, permitting such suppliers to suspend deliveries to Edison at any time or times and for such period of time as may be necessary for such suppliers to maintain service to their higher priority customers. Being in the class of customers served at lowest priority, Edison is among the first to feel the impact of any decrease in gas supplies to the area, or the impact of any inability of the gas suppliers to obtain additional volumes of gas to meet the increasing needs of the public in southern California. Because of its size, Edison sustains the principal brunt of any such impact.

For these reasons, Edison long and earnestly has sought additional competition by gas suppliers for its market in Southern California. The Edison market was in fact the focal point of the competition between El Paso and Pacific Northwest, which ultimately was

found to be suppressed by El Paso's acquisition of Pacific Northwest. The prior decisions in this matter (*United States v. El Paso,* 376 U.S. 651 (1964) and *Cascade v. El Paso,* 386 U.S. 129 (1967)) describe at some length Edison's operations and its early efforts to obtain competitive supplies of gas. Such efforts have continued to the present moment; they were the reason for Edison's appeal in *Cascade, supra,* and for its participation in this proceeding. Over the years Edison has spent large sums and made commitments literally into the millions of dollars in its efforts to obtain access to competitive suppliers, and it may safely be said that no one has more earnestly or industriously sought additional gas supply competition than has Edison.

Against this background, Edison submits that the Court's decision of June 16, 1969, will be harmful rather than helpful to the effort to obtain adequate competitive supplies of gas at a reasonable price and will have anti-competitive effects.

Edison Has Not Been Heard on the Merits.

2. This Court, which has so long and so carefully protected the rights of those appearing before it to a full and fair hearing, has in this solitary instance denied Edison (and others similarly situated) any hearing at all on the merits of the District Court decision. The notice issued by the Court put at issue only the motion to dismiss the appeal, and the motion of Mr. Bennett for a hearing. Edison deemed it unnecessary to argue that issue, but did advise the Court that it would have a repre-

sentative present in case the Court desired to question Edison relative to its position in the matter being heard. Had the Court given even the slightest indication that it intended to consider the decision of the District Court on the merits, and especially that part of the decision pertaining to the allocation of gas reserves, Edison certainly would have sought time for argument and the opportunity to file a brief. We could and would have pointed out in detail from the uncontroverted record the evidence (described briefly hereinafter) which conclusively establishes the potential for injurious consequences to Edison and other California consumers of any such reallocation of reserves as the Court apparently now contemplates. Whether we could have persuaded the Court to affirm the judgment of the District Court is beside the point: we at least would have had our day in court, and this Court would have been apprised of the critical fuel supply situation with which we are threatened by its present opinion, and, even if adhering to its present views, this Court then could, and we believe would, have been in a better position to have considered the wisdom of more specific provisions supplying at least the clarification we now seek by our alternative plea. While Edison is a corporate rather than an individual party, its rights to a full and fair hearing should be no less than those of any other party, particularly in this case where Edison speaks on behalf of the millions of southern California electric consumers who depend upon it for reliable and economic electric service as well as for itself.

A Reallocation of Gas Supplies Will Be Harmful Rather Than Helpful to Competition.

3. This Court's decision at least suggests, and may be interpreted to command, a reallocation of sufficient volumes of gas from El Paso to New Company to support an immediate new project to California. The evidence of record conclusively establishes that the minimum volume required for such a new project would be 300,000 Mcf per day, and that even that volume would produce an economically marginal operation. The Court's decision indicates that the reserves necessary to support such a new project volume are to be reallocated to the New Company from the San Juan Basin. The physical deliverability of San Juan reserves is notoriously low, and the volume of gas reserves required to sustain a deliverability of 300,000 Mcf per day from San Juan would be significantly greater than the volume of gas reserves required from fields with higher deliverability characteristics. The evidence of record establishes that the divestiture of such a reserve volume from San Juan would seriously jeopardize, and perhaps even destroy, El Paso's ability to meet its present contractual commitments for gas deliveries to Southern California.[2] Equally important, it could prevent the delivery of additional vol-

[2]It is undeniably true that El Paso and its immediate customers (*not* including Edison) undertook these commitments and the Federal Power Commission authorized them with full knowledge of the pendency of this case, and despite repeated and vigorous protestation by Edison and others to the FPC and the courts (including this Court *e.g.*, Edison's Petition for certiorari in No. 1329 October Term 1967) that this very predictable consequence could obtain. It comes as cold comfort to Edison to be proven correct *now*, however, after all legal and practicable remedies have been exhausted. The only course of action which can save Edison and others now from such folly is continued maintenance of full, uninterrupted deliveries to California.

umes of gas by El Paso over and above its present contractual commitments for an extended and indeterminate period, since any new gas reserves El Paso may be able to acquire might be required to be devoted to making up the supply deficit for present commitments occasioned by the reallocation before expanded service could be authorized or implemented.

4. Whatever volume of reserves the District Court in this case may reallocate to New Company, no new pipeline to California can be built by New Company until it has obtained contracts for the sale of that gas, and has secured the necessary Certificate of Public Convenience and Necessity from the Federal Power Commission. Even after a certificate is issued by the Federal Power Commission as contemplated by this Court's decision, extensive and expensive facilities still must be financed and constructed. The time lag between the acquisition by New Company of such additional reserves from El Paso and the physical delivery of such supplies by New Company through new pipeline facilities to California thus will be extensive, and, although indeterminate in duration, could not possibly, it is believed, be less than two years.[3] It is not realistic to expect El Paso to be able to maintain from its gas supplies remaining after such a reallocation even the current level of its deliveries to California for such an extended period, much less to provide the additional increment of total supply to California which has been contracted for by Edison's suppliers and which is sorely needed. The Court's action thus threatens the California market, and Edison in particular, with the actual loss of

[3]Absent almost instant action by FPC on New Company's application to serve California, the time lag will be appreciably longer.

substantial volumes of gas for an indefinite period of time. This loss could be permanent if New Company, despite its acquisition of such additional reserves and this Court's clear intent that they be sold to California markets, should not offer such gas to California markets on a non-discriminatory basis, or should fail to secure a certificate to serve California or financing on acceptable terms. In such case, the reallocated reserves, which were bought for service to California and dedicated to that service and which are to be divested solely to create competition in California, could be diverted from California to other markets to the permanent detriment of the California consumer. In Edison's considered opinion, this Court's present decision could well precipitate a critical gas supply crisis in southern California for at least the next several years, with Edison as the principal sufferer.

5. The decision of the District Court, based on a comprehensive record which clearly spelled out these consequences, assiduously sought an equitable solution which would provide New Company with the capacity to compete for new increments of supply to the California market, but would not destroy El Paso's ability to meet its present commitments or itself to compete for such new increments. If the objective sought is the maximum amount of competition, it is just as necessary to achievement of that objective to keep El Paso competitive as it is to make the New Company viable. Edison submits that the decision below, insofar as gas supply is concerned, did indeed provide an equitable solution, and did grant gas reserves to New Company no less than those previously available on a relative basis to the independent Pacific Northwest, in strict accord-

ance with the command of *Cascade*. The reallocation now required would not effectuate the *Cascade* mandate, but rather would prevent effective achievement of the objective of *Cascade*. The District Court decision should be reinstated in this respect. In the alternative, if this Court should deny rehearing, or determine upon rehearing to adhere to its present decision of June 16, 1969, Edison respectfully but most urgently submits that it would be of assistance to the lower Court on remand if this Court would clarify or expand on its views so as to indicate with greater specificity the manner in which its desire to protect the innocent California consumers, including Edison, from the dire consequences of a critical gas supply shortage are to be implemented. This can be done by affirmative instruction to the District Court to devise and to implement, on remand, such procedures and contractual or other commitments as may be necessary to prevent the temporary or permanent loss by the California market of any additional San Juan or other reserves reallocated to New Company in order to provide competition in California. Edison is satisfied that there are entirely feasible and practicable protective measures available which would achieve this result, and would not impede achievement of the objectives sought both by this Court and by Edison *i.e.*, more and more effective competition in the California market. Such an instruction would detract not a whit from the force of the present decision, if that is to stand, and would insure that the California gas consumers, the intended beneficiaries of that decision, will obtain such benefit without being burdened by the loss of supplies already committed to them. We, therefore, pray for the issuance of such more specific affirmative instructions, whether rehearing be granted or not.

Assumption by New Company of a Reasonable Amount of El Paso's Existing Debt Would Be Beneficial to Competition.

6. The Court's decision suggests, and may be interpreted to command, disallowance of the "assumption" by New Company of $170,000,000[4] of El Paso's indebtedness. The Court finds that this debt "assumption" (more commonly referred to on the record as a "roll over") "helps keep the two companies in league." The Court does not explain how such a "roll over" might keep the two companies in league, and it may be demonstrated that the Court's order, if not modified in this respect, could itself produce anti-competitive effects. As the record discloses, what in fact was proposed was the issuance of New Company bonds to present bondholders in exchange for El Paso bonds, which then would be cancelled and retired by the bondholders. At the end of the "roll over" the only association between the two companies would be that the same persons then owned bonds of each company. The fact is that those same persons now own and will continue to own bonds of other pipeline companies, and those same persons in major part will own bonds of both El Paso and New Company whether the "roll over" is accepted or New Company finances its acquisitions independently.

The money market for this type of security is essentially the same regardless of the identity of the issuer.

---

[4]This figure is approximate since it fluctuates with the retirement of existing debt and the addition of new debt by El Paso. Moreover, it was "pegged" by El Paso at the approximate level of the tax basis of the properties for tax reasons. With a cash sale, the reason for "pegging" it at the tax basis level may disappear. If the Court on rehearing permits a "roll over," the District Court should be directed to determine the appropriate amount.

New Company will have to raise debt capital under any circumstances, and in order to do so it must offer debt securities to substantially the same persons who now own debt securities of El Paso and of other pipeline companies, and who would have owned the debt securities "rolled over" if that had been allowed. All that the disallowance of the "roll over" accomplishes is a substantial increase in the interest rate payable on New Company's debt securities. It is common knowledge, of which the Court can take judicial notice, that interest costs are at the highest point in history. A new debt issue by New Company today would require an interest rate of approximately 9%; the composite rate available by means of the "roll over" should be in the order of 5¼%. The cost of capital is an integral part of the allowable reasonable return on investment of a pipeline company, and thus of its resulting rates to consumers. Higher capital costs thus can only impede rather than assist New Company in its effort to compete in the California market. At least this aspect of the plan of divestiture approved by the District Court should be reinstated.

Wherefore, Edison prays that the Court grant rehearing of its decision of June 16, 1969, affording all parties an opportunity to address themselves to the merits of the District Court's decision, and its compliance with the mandate of *Cascade;* in the alternative, Edison prays that the Court (1) clarify or supplement its opinion by instructing the District Court on remand to take such steps as may be necessary to prevent temporary or permanent loss to California of reserves dedicated to its gas supply service and (2) reconsider its decision relative to the "rollover" of a portion of the El Paso

debt and permit the assumption of a portion thereof by the New Company without the need for new financing at today's exceedingly high interest rates.

Respectfully submitted,

SOUTHERN CALIFORNIA EDISON COMPANY,

By ROLLIN E. WOODBURY,
Vice President and General Counsel.

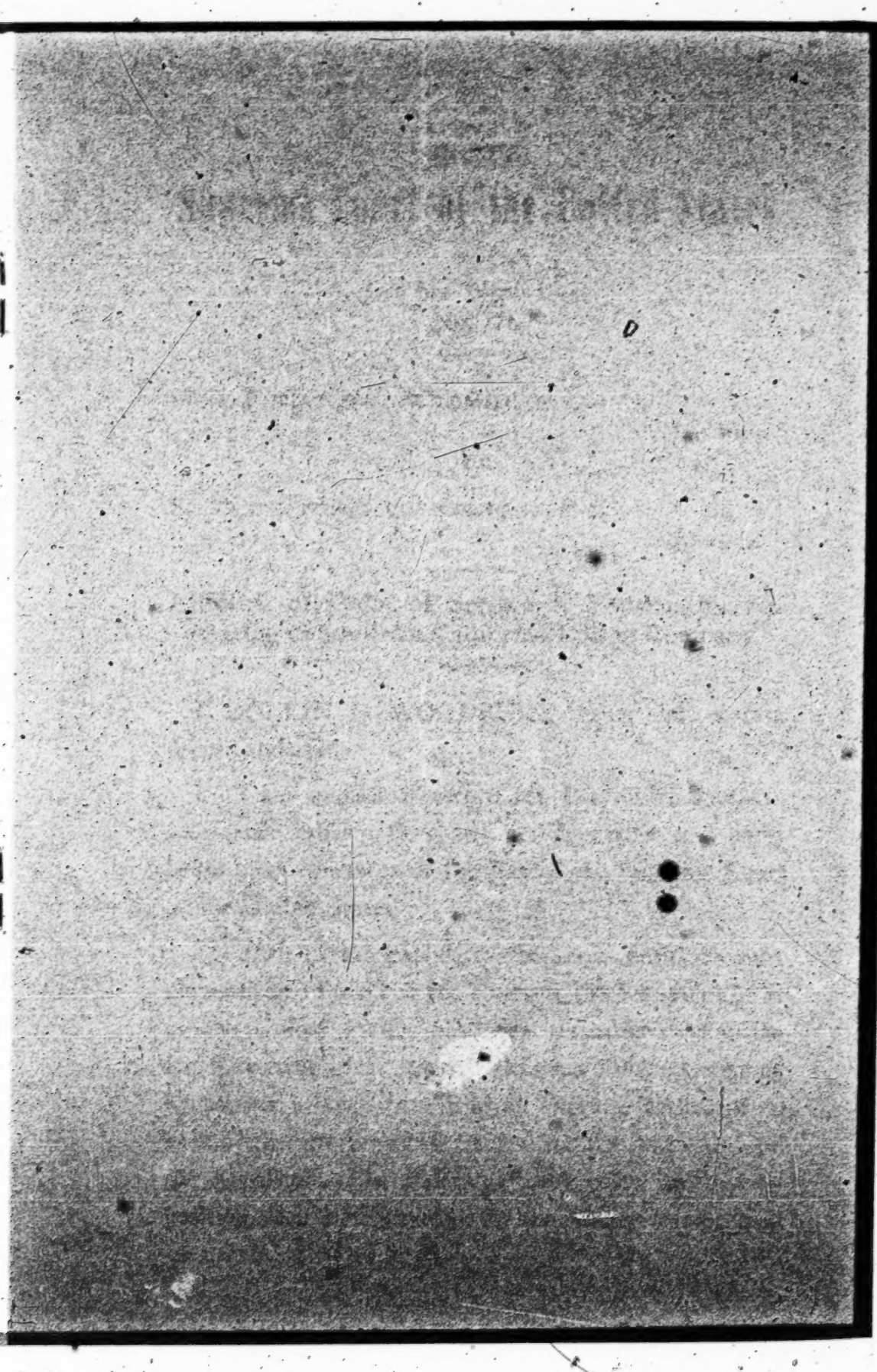
ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
WILLIAM E. MARX,
Post Office Box 351,
Los Angeles, Calif. 90053,

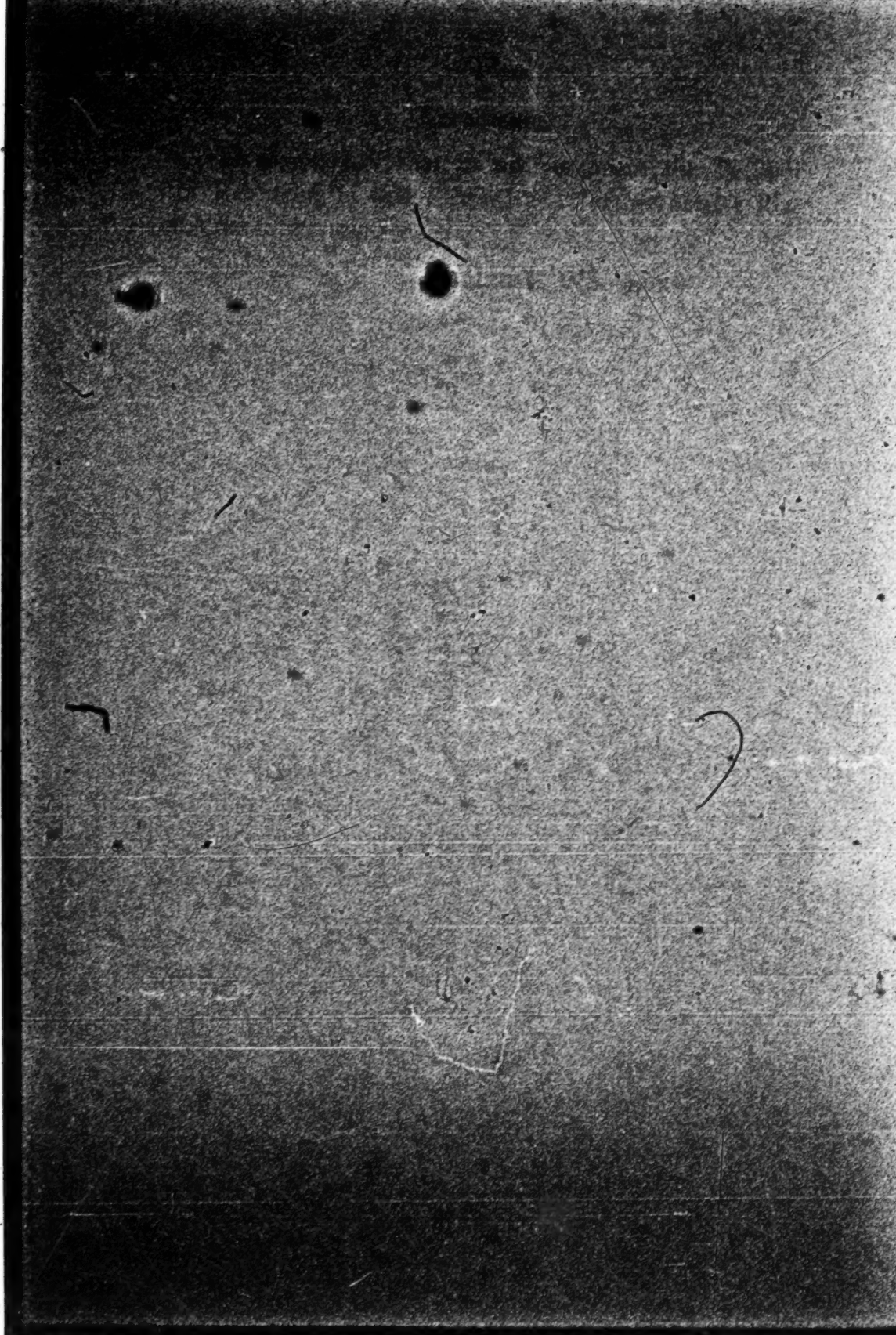
R. CLYDE HARGROVE,
1123 Commercial National Bank Building,
Shreveport, Louisiana 71101,

Certificate.

I hereby certify that in my judgment the Petition for Rehearing is well founded and further certify that it is not interposed for delay.

ROLLIN E. WOODBURY.





IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

Affidavit of Proof of Service of Petition for Rehearing of Southern California Edison Company.

I, ROLLIN E. WOODBURY, being duly sworn, depose and say:

1. I am counsel of record for Petitioner, Southern California Edision Company, an intervener and party below, and a member of the Bar of the Supreme Court of the United States.

2. Each of the parties to the above entitled cause, pursuant to Rule 33 of the Rules of the Supreme Court of the United States, has been served with Petition for Rehearing of Southern California Edison Company by placing a copy thereof in an envelope addressed to each of the attorneys listed below for the Appellant and the Appellees at the addresses listed below and by depositing each such envelope in the United States mail

with air mail postage prepaid as to all addressed, and by placing a copy of the foregoing Petition in an envelope addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 and by depositing said envelope in the United States mail with air mail postage prepaid.

3. Each of the other parties who have appeared in the cause entitled *United States of America, Plaintiff, vs. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation, Defendants,* in the United States District Court for the District of Utah, Central Division, Civil Action No. 143-57, has also been served with the foregoing Petition by placing a copy thereof in an envelope addressed to each of the attorneys listed below for such parties at the addresses listed below and by depositing each such envelope in the United States mail with air mail postage prepaid.

APPELLANT, UTAH PUBLIC SERVICE COMMISSION:

Phil L. Hansen
The Attorney General
State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Daniel L. Berman
Special Assistant to Attorney General
State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

APPELLEE, EL PASO NATURAL GAS COMPANY:

Leon M. Payne, A. H. Ebert, Jr., Dexter Peacock

Andrews, Kurth, Campbell & Jones
25th Floor Humble Building
Houston, Texas 77002

G. Scott Cuming, General Counsel
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79999

Edward G. Najaiko
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79999

PARTIES IN U.S.D.C., UTAH, CENTRAL DIVISION, CAUSE NO. 143-57:

PLAINTIFF, UNITED STATES OF AMERICA:

John H. Dougherty
Department of Justice
Washington, D.C. 20530

DEFENDANTS, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION:

Leon M. Payne, A. H. Ebert, Jr., Dexter Peacock

Andrews, Kurth, Campbell & Jones
25th Floor Humble Building
Houston, Texas 77002

G. Scott Cuming, General Counsel
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79999

Gregory A. Harrison, Atherton Phleger, David F. Mackie
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

Edward G. Najaiko
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79999

Richard W. Giaugue
Van Cott, Bagley, Cornwall & McCarthy
141 East First South
Salt Lake City, Utah 84111

SUCCESSFUL APPLICANT:

Colorado Interstate Gas Company
Walter W. Sapp
General Counsel
Post Office Box 1087
Colorado Springs, Colorado 80901

James L. White
Holland & Hart
500 Equitable Building
Denver, Colorado 80202

Macoy A. McMurray
McKay & Burton
500 Kennecott Building
Salt Lake City, Utah 84111

INTERVENORS:

State of Arizona ex rel.
The Arizona Corporation Commission
Arizona Public Service Company.
Tucson Gas & Electric Company:

Darrell F. Smith
Attorney General
State of Arizona
State Capitol
Phoenix, Arizona

Louis H. Callister
Callister, Kesler & Callister
10 East South Temple
Salt Lake City, Utah 84101
Attorney for: Arizona Public Service Company
Tucson Gas & Electric Company

John T. Miller, Jr.
101 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for: State of Arizona ex rel.
The Arizona Corporation Commission
Arizona Public Service Company
Tucson Gas & Electric Company

Holesapple, Conner, Jones, McFall & Johnson
Fourth Floor, Valley National Building
Tucson, Arizona

Snell & Wilmer
400 Security Building
Phoenix, Arizona

Cascade Natural Gas Corporation
Intermountain Gas Company
Northwest Natural Gas Company
The Washington Water Power Company
Washington Natural Gas Company
Idaho Public Utilities Commission
Public Utility Commissioner of Oregon and Washington Utilities and Transportation Commission:

Richard B. Hooper
Jones, Grey, Kehoe, Bayley, Hooper & Olsen
1000 Norton Building
Seattle, Washington 98104

California-Pacific Utilities Company:

James E. Faust
922 Kearns Building
Salt Lake City, Utah 84101

The People of the State of California

Thomas C. Lynch, Attorney General
of the State of California
Iver E. Skjeie, Deputy Attorney General
Fifth Street and Capitol Mall
Sacramento, California 95814

Public Utilities Commission of the State of California:

Mary Moran Pajalich
5072 State Building
San Francisco, California 94102

Sheldon Rosenthal
5072 State Building
San Francisco, California 94102

State of Colorado, ex rel.
Colorado Public Utilities Commision:

Duke W. Dunbar
Attorney General
State of Colorado
Denver, Colorado 80203

Robert Lee Kessler
506 State Service Building
Denver, Colorado 80203

Jacob Goldberg, Special Assistant Attorney General
810 Pennsylvania Building
Washington, D.C. 20004

Mountain Fuel Supply Company:

Joseph S. Jones
800 Walker Bank Building
Salt Lake City, Utah

Public Service Commission of Nevada:

Harvey Dickerson
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701

New Mexico Public Service Commission:

Boston E. Witt
Attorney General of New Mexico
Dennis R. Francish
Special Assistant Attorney General
State Capitol Building
Santa Fe, New Mexico

Pacific Gas and Electric Company:
Richard H. Peterson
Malcolm H. Furbush
245 Market Street
San Francisco, California

Southern California Gas Company and
Southern Counties Gas Company of California:
John Ormasa, Harvey Goth, Roger J. Nichols
Post Office Box 54790, Terminal Annex
Los Angeles, California 90054

Of Counsel:
Neil R. Olmsted
2324 Adams Avenue
Ogden, Utah

Southwest Gas Corporation:
Charles H. McCrea
Vice President and General Counsel
Post Office Box 1450
Las Vegas, Nevada

Utah Gas Service Company:
Edward F. Richards
Gustin & Richards
Walker Bank Building
Salt Lake City, Utah

Public Service Commission of Wyoming:
Lawrence E. Johnson, Chief Special
Assistant Attorney General
Don M. Empfield, Special Assistant Attorney
General
State of Wyoming
State Capitol Building
Cheyenne, Wyoming

San Diego Gas & Electric Company:
Sherman Chickering
Donald J. Richardson, Jr.
111 Sutter Street
San Francisco, California 94104

Pacific Lighting Service & Supply Company:
Roger J. Nichols
720 West Eighth Street
Los Angeles, California

Public Service Companies of Colorado:
E. A. Stansfield
Room 990, 550 Fifteenth Street
Denver, Colorado

California Gas Users Association:
Henry F. Lippett, 2nd
626 Wilshire Boulevard
Los Angeles, California 90017

UNSUCCESSFUL APPLICANTS:

Aspen Pipeline Company:
Henry S. Nygaard
920 Boston Building
Salt Lake City, Utah

David T. Searls
Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston, Texas 77002

The Colonial Group:
Dayid K. Watkiss
315 East Second South
Salt Lake City, Utah

Bradford Ross, Sherman S. Poland, James D. McKinney, Jr.
Ross, March & Foster
725 Fifteenth Street, N.W.
Washington, D.C. 20005

Risher Thorton
First National Bank Building
Midland, Texas

Continental Pacific Corporation:

William Howard Wolf, B. J. Bradshaw
Fullbright, Crooker, Freeman, Bates & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Calvin A. Behle
520 Kearns Building
Salt Lake City, Utah

Great Lakes Carbon Corporation:

Oscar W. Moyle, Jr.
800 Deseret Building
Salt Lake City, Utah 84111

Pacific Western Pipeline Corporation:

William H. Ferguson
Thomas J. Greenan
Ferguson & Burdell
929 Logan Building
Seattle, Washington 98101

Ted Stockmar
Holme, Roberts & Owen
1700 Broadway
Denver, Colorado

Paul B. Cannon
Cannon, Greene, Piercey, Nebeker & Horsley
400 Kennecott Building
Salt Lake City, Utah 84111

Paradox Production Corporation:
C. Keefe Hurley
Earl Cooley
60 State Street
Boston, Massachusetts

Brigham E. Roberts
Wayne L. Black
Judge Building
Salt Lake City, Utah 84111

Joseph Rosenblatt, et al.,—Husky Oil Company Group:
C. Preston Allen
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah

Western States Pipeline Corporation:
Alfred H. Stoloff
Phillips, Coughlin, Buell & Phillips
Electric Building
Portland, Oregon 97205

Dale E. Anderson
Fabian & Clendenin
Continental Bank Building
Salt Lake City, Utah 84101

4. A copy of the foregoing Petition has also been placed in an envelope addressed to each of the following and deposited in the United States mail with air mail postage prepaid:

The Honorable Hatfield Chilson
United States Courthouse
Denver, Colorado

Richard A. Solomon
General Counsel
Federal Power Commission
Washington, D.C. 20426

William M. Bennett
35 Evergreen Drive
Kentfield, California

John J. Flynn
954 Military Drive
Salt Lake City, Utah

I. Daniel Stewart, Jr.
2900 Millicent Drive,
Salt Lake City, Utah

DATED: This 8th day of July, 1969.

ROLLIN E. WOODBURY

Subscribed and sworn to before me this 8th day of July, 1969.

DONA MARY WILCOMB
Notary Public in and for the County of Los Angeles, State of California

My Commission expires June 27, 1973.